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EXPEDITED HANDLING REQUESTED

March 22, 2000

BY HAND

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
ATTN: STB Ex Parte No. 582
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Public Views on Major Rail Consolidations (STB Ex Parte No. 582)

Dear Mr. Williams:

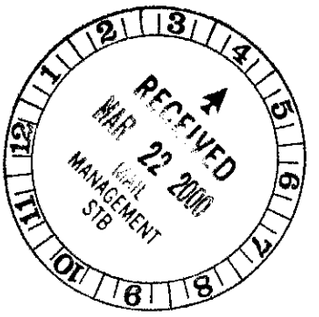
Enclosed, for filing in the above-referenced docket are an original and 10 copies of the Petition of Canadian National Railway Company for Stay Pending Judicial Review of the decision served March 17, 2000 in this proceeding. Also enclosed is a diskette containing the text of this document in WordPerfect 6/7/8/9 format.

Very truly yours,

Paul A. Cunningham

Paul A. Cunningham

Enclosures



SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

PETITION OF CANADIAN NATIONAL RAILWAY COMPANY FOR STAY PENDING JUDICIAL REVIEW

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March 22, 2000

PETITION FOR STAY PENDING JUDICIAL REVIEW

Pursuant to the Board's Rules of Practice, 49 C.F.R. § 1115.5, Canadian National Railway Co. ("CN") hereby petitions for a stay pending judicial review[1] of the Board's decision served March 17, 2000 ("Decision"). Rather than repeating positions stated in BNSF's petition for a stay, CN will supplement BNSF's arguments.

INTRODUCTION

The Board's moratorium is not authorized by statute. It conflicts with the approach to control transactions prescribed by Congress in the Interstate Commerce Commission Termination Act ("ICCTA") because it makes the strict timetables that ICCTA imposed on the Board meaningless.

Harmful consequences follow from the Board's ultra vires order. The Board has frozen the competitive structure of an entire industry for at least two to three years, causing irreparable injury to CN, BNSF, and their shippers. The moratorium is overbroad in relation to the service problems that are the Board's motivating concern; and may have unconstitutionally bound and gagged railroad managements through a catch-all prohibition. By failing to differentiate between the service and other characteristics of the Class I carriers that support a moratorium and BNSF and CN, which oppose it, the Board is protecting competitors in an anti-competitive fashion.

All of this is unnecessary. The Board's normal processes, carefully applied, enable it to reach results in the BNSF/CN docket that properly respond to immediate concerns. The Board, for example, has the means to constrain another "round" of consolidations during its rulemaking without foreclosing the opportunity to hear whether a particular consolidation is in the public interest. In these circumstances, each of the four factors that the Board has identified for a stay pending judicial review has been satisfied.[2]

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[1]CN filed a petition for review of the Board's decision on March 17, 2000 (D.C. Cir. No. 00-1118), as did BNSF (D.C. Cir. No. 00-1120) and the Western Coal Traffic League (D.C. Cir. No. 00-1115). CN also intends to file a motion with the Court of Appeals for stay of the Board's decision. The Board's action on this stay petition may make unnecessary the relief to be sought from the court.

[2]See Union Pac. Corp. – Control and Merger – Southern Pac. Corp., STB Finance Docket No. 32760 (Sub-No. 36), slip op. at 1 (STB served Oct. 29, 1999) (granting stay).

I. UPON JUDICIAL REVIEW, CN IS LIKELY TO PREVAIL ON THE MERITS

A. The Board Does Not Have The Statutory Powers It Claims

The Decision conflicts with the ICCTA scheme of deadlines and procedures embodied in 49 U.S.C. §§ 11324 and 11325. It is an unlawful exercise of authority unless the Board has other authority that "trumps" the ICCTA scheme.

There is, however, no such other authority. The substantive provisions cited as authority in the Decision, subsections (a) and (b)(4) of 49 U.S.C. § 721, are ancillary to the Board's explicit statutory powers, and for reasons substantially set forth in BNSF's petition, provide no authority for the Board's action. The Board has cited no explicit statutory power that it is "carrying out," as would be required to invoke section 721(a), or as to which its moratorium order is "necessary" and "appropriate," as required by section 721(b)(4). The moratorium is thus unlawful, "[r]egardless of how serious the problem an administrative agency seeks to address." FDA v. Brown & Williamson Tobacco Corp., No. 98-1152, slip op. at 1 (U.S. Mar. 21, 2000).[3]

The Board did cite the Rail Transportation Policy ("RTP") as the statutory source of the interests with respect to which it was acting to prevent "irreparable injury." See Decision at 9-10. The RTP, however, can be implemented only through the substantive regulatory provisions of the Act; it is a measure of the correctness of the Board's exercise of its regulatory powers, but it is not a source of such powers.[4] The Board does not have plenary authority outside of any particular regulatory provision to implement the RTP directly, whether as an exercise of ancillary powers or otherwise to prevent "irreparable injury." For example, the Board could not initiate a rulemaking to implement the RTP directly; it could only issue rules

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[3] See also Brae Corp. v. United States, 740 F.2d 1023, 1059 (D.C. Cir. 1984) ("discretionary powers surely do not evade the explicit requirements . . . that reflect a specific set of Congressional concerns"), cert. denied, 471 U.S. 1069 (1985).

[4] See Petition to Disclose Long-Term Rail Coal Contracts, Ex Parte No. 387 (Sub-No. 961), 1988 ICC Lexis 222 at *16 (RTP "represents broad policy goals to be considered when performing our regulatory role. . . . [E]ach rail provision is to be read with the RTP in mind.").

to implement particular regulatory provisions.[5] Most certainly, the policies in the RTP "do not supersede specific provisions of the statute." Petition to Disclose Long-Term Rail Coal Contracts, supra, at *16. Thus, the Board can properly take the RTP into account in deciding whether to amend its control-transaction rules and in applying the "public interest" standard of section 11324(c) to particular transactions. The RTP does not authorize the Board to "supersede specific provisions of the statute" that govern the timetable for its consideration of such transactions. Id.

B. The Board Has Improperly Invoked Section 721(b)(4)

Section 721(b)(4) is simply not a freestanding authority to prevent whatever the Board may deem to be irreparable injury. In DeBruce Grain, Inc. v. Union Pac. R.R., STB Docket No. 42023 (STB served Apr. 27, 1998), the Board (agreeing with Union Pacific),[6] stated that the criteria for exercising its authority under section 721(b)(4) are the same as those governing preliminary injunctions; it rejected the "narrow view" that irreparable harm is the only relevant consideration. The criteria include the movant's likelihood of success on the merits, *i.e.*, the merits of the pending adjudicative proceeding in which the order is issued. Id. at 3 n.7. Prior to the Decision, the ICC and the Board had issued such relief only where sought by movants in particular adjudications. Here, the Board's "unprecedented" (Decision at 10) Decision was issued solely in the context of Ex Parte No. 582, which is a public hearing, not an adjudication, and without

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[5]Global Van Lines v. ICC, 714 F.2d 1290, 1295-96 (5th Cir. 1983) (noting with reference to predecessor to RTP that"general congressional exhortation to 'go forth and do good,' without more, is not a proper foundation for the sound development of administrative law").

[6]As UP correctly stated to the Board in that case: "The way DeBruce is reading new Section 721(b)(4) would mean that the section has vastly expanded the Board's ability to regulate rail transportation as compared to the ICC's. Indeed, under DeBruce's view of Section 721(b)(4) the Board could issue an administrative injunction even if there were no violations of the Act's substantive provision (the practical equivalent of eliminating the requirement for a 'likelihood of success on the merits'). There is not a shred of support in the statute or its legislative history to support the notion that such a vast expansion of rail regulation was being enacted or intended. In fact, such a construction would be contrary to the overall thrust of the ICC Termination Act, which was to reduce regulation of railroads. . . ." Reply of Union Pacific Railroad Company to Motion For Emergency Order, at 6-7 (Nov. 14, 1997) (emphasis in original citing legislative history).

any assessment of a movant's likelihood of success on the merits of a particular claim. Indeed, the fact that there could be no such assessment in the present context (what merits? whose likelihood of success? in what proceeding?) demonstrates that the Board has attempted to invoke section 721(b)(4) in an inappropriate context.

Moreover, by its terms, section 721(b)(4) does not excuse the Board from any provision of law other than the cited provisions of the Administrative Procedure Act, which concern procedural requirements for agency rulemaking and formal adjudication. Section 721(b)(4) provides no basis for the Board to override directly or indirectly the mandatory statutory framework that ICCTA established for expeditious review of control applications, which imposed specific time requirements. See Post-Hearing Comments of Canadian National Railway Co. in Ex Parte 582.[7]

C. As A Section 721(b)(4) Order, the Decision Is Procedurally and Substantively Defective

Even if section 721(b)(4) provided freestanding authority, the Decision would still be procedurally defective. There was no prior notice or opportunity to address that provision of the statute and its requirements. And while a finding of "irreparable injury" is by its nature forward-looking, the Board has acted here not upon evidence but upon speculations derived from contradictory and otherwise implausible assertions that cannot support such a finding. Thus, for example, the Decision relies upon threats by CN's competitors that amount to this: during the pendency of the BNSF/CN proceeding, those competitors would expend their management energies in the consideration or pursuit of transactions that could have little or no hope of Board approval because they are contrary to the interests of their shippers and the public. Further, this finding accepts the contradiction in the assertions of the competitor railroads: that they will be forced to focus on their own mergers but that mergers are unnecessary in order to bring to shippers most of the

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[7]Prior to enactment of ICCTA, the ICC declined to defer decision in one control proceeding to await the results of a battle between UP and BN for control of Santa Fe because it could not be done consistently with the then-existing statutory deadlines. Union Pac. Corp. -- Control -- Chicago & N.W. Transp. Co. Finance Docket No. 32133, Decision No. 25 at 60-61 (ICC served Mar. 7, 1995).

benefits that mergers bring.[8] And it simply ignores the uncontradicted evidence that the railroad industry is having no difficulty raising the debt capital that it needs for continuing investment in rail assets.

Moreover, even if authorized and procedurally proper, the Decision is substantively defective. First, the moratorium is overbroad (and thus neither "necessary" nor "appropriate") insofar as it applies to the application to be filed by CN and BNSF, and for that reason alone it is arbitrary and capricious. If the Board believes it has the power it exercised in the Decision, to avoid the reactions that other railroads might have to the BNSF/CN proposal, it was only necessary to exercise that power against those railroads who sought Board action to prevent them from considering follow-on combination possibilities until at least a number of years had passed. The Board's perceptions that it faces "not ordinary circumstances" and that the moratorium is "unprecedented" only heightens the need to limit in this way what might otherwise be an overreaction, particularly in light of the undeniably anticompetitive consequences of a moratorium. Those consequences make it all the more essential that any action be no broader than necessary.

The Board sought to justify its moratorium order on the grounds that "the rail community is not in a position to now undertake what will likely be the final round of restructuring of the North American railroad industry, and . . . our current rules are simply not appropriate for addressing the broad concerns associated with reviewing business deals geared to produce two transcontinental railroads" (Decision at 2). Of course, the BNSF/CN combination is not necessarily part of such a "final round." And the radical step of a moratorium was not needed to deal with these concerns; the Board has more measured means, which it did not choose.

The Board could have confirmed that, in applying the public interest standard to the BNSF/CN application and any future applications, it would examine the possible effects of the transaction on the service of other carriers; the current service levels of the applicant carriers; the reasons for expecting that

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[8]In conflict with its "distraction" rationale based on the BNSF/CN control proceeding, the Board has invited pervasive distraction by proposing a prolonged rulemaking that invites reopening of a number of issues that had been settled by prior decisions.

the applicant carriers will implement the proposed transaction without major service disruptions (as to which their performance in implementing prior mergers would be relevant and material); and the financial ability of the applicant carriers to carry out the integration measures contemplated by the application and to continue to invest after the transaction.

The Board could have stated that negative findings as to these factors will make it unlikely that the Board would conclude that the transaction is in the public interest, absent an extraordinary showing of countervailing public benefits. Such an announcement would, as a practical matter, make it highly unlikely that UP, CSX or NS would apply for control authority during the next 15 months, that there would be another "round" of control proceedings, or that the Board would be presented with an application to create the first of what might be only two transcontinental US railroads. This announcement would, of course, be consistent with the Board's Decision No. 1A in the BNSF/CN docket, in which it stated that it would take into account "downstream effects."

Neither of the above alternatives would preclude the Board from initiating a rulemaking to consider issues that may be posed by transcontinental U.S. mergers, and any other issues relating to control proceedings. Should the rulemaking reveal an additional element of the public interest not limited to proposals for transcontinental railroads, the significance of that new element for the BNSF/CN proceeding, and how that element should be applied, it can be dealt with in that proceeding. If CN and BNSF are willing to take that regulatory risk, it is not reasonable for the Board to refuse them a hearing.[9]

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[9]There would be nothing new in a rulemaking proceeding to amend the Board's rules for control proceedings during the pendency of an individual control proceeding. That has occurred repeatedly since the Staggers Act. See, e.g., Ex Parte No. 282 (Sub-No. 19) (STB served Nov. 24,1999) (terminating proposed rulemaking in effect during BN/Santa Fe, UP/SP, CSX/NS and CN/IC proceedings); Railroad Consolidation Procedures, 366 I.C.C. 75 (1982)) (adopting final rules during pendency of UP/MP/WP proceeding). Moreover, similar risk is always present in a control proceeding; witness, for example, the additional requirements concerning new competition in the CSX/NS proceeding, and the growth of requirements concerning environmental protection and safety.

Second, the moratorium is also at odds with the First Amendment.[10] The order directs all Class I railroads to "suspend activity relating to any railroad transaction that would be categorized as a major transaction." It raises fundamental constitutional questions to the extent it precludes a wide range of activities that may arise over time, including the following illustrative list:

- Seeking Congressional or Executive Branch support for action to nullify the Decision and to allow the BNSF/CN transaction to be timely reviewed and approved.
- Fulfilling existing contractual obligations related to potential major control transactions, such as the holding of shareholder meetings and votes.
- Informing shareholders or other stakeholders of the state of a pending or potential future major control transaction.
- Unilaterally studying possible major control transactions (as UP apparently did as to CP), including studies of the potential impacts of alternative control transactions in comparison to each other and to the status quo to determine which might best promote the financial health of the industry and improve service to shippers.
- Developing or communicating plans for the period during and following the moratorium that would relate to a major control transaction.
- Communicating with any party, including employees, carload and intermodal customers, federal, state, and local officials, shareholders, potential investors, consultants, bankers, other railroads, and the media about plans that would or might entail a major control transaction or a response to a major control transaction.
- Developing mechanisms to increase environmentally beneficial competition with trucks that would depend on or relate to a major control transaction.[11]
- Discussing or entering into financial and other contractual arrangements with non-railroad parties or changing charter provisions in anticipation of offensive or defensive strategies with respect to one or more future control transactions.

II. THE BALANCE OF HARDSHIPS FAVORS CN

A. CN and The Public Interest Will Suffer Irreparable Harm Absent A Stay

Courts have recognized that irreparable harm results inherently "as a matter of law" from delay in

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[10] E.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). Action that trenches upon such constitutionally protected interests is subject to a higher level of scrutiny and bears a heavier burden of justification. Action that trenches upon such constitutionally protected interests is subject to a higher level of scrutiny and bears a heavier burden of justification.

[11] The Decision (at 11) concluded with the boilerplate statement that it will not significantly affect the environment or conservation of energy resources. However, there is no evident basis for such an assertion about deferral of a transaction that can be expected, e.g., to reduce the volume of truck traffic. See 42 U.S.C. §§ 4321 et seq.

corporate control transactions.[12] For example, laws that delay tender offer processes in conflict with Congressionally imposed time limitations inherently give rise to irreparable injury, because delay is precisely the harm that Congress sought to avoid. See Kennecott, 637 F.2d at 188-89.

With respect to railroad control proceedings in particular, Congress, protecting both public and private interests, made clear in the 1976 and 1980 amendments to the Interstate Commerce Act, and reaffirmed in ICCTA, that delay in railroad control proceedings is intolerable. Congress recognized that complex control transactions are highly time-sensitive, which is why it left timing to private initiative; and if there are shipper benefits to be had, delay means that they are irretrievably lost. The injuries occasioned by the Board's sweeping prohibition are both concrete and inevitable.

Moreover, infringement of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); Branch v. FCC, 824 F.2d 37, 40 (D.C. Cir. 1987).

B. A Stay Will Not Harm The Public Nor Other Parties

The Board's Decision purports to base the imposition of the moratorium on certain supposed "harms" to the railroad industry and, even more tenuously, to the public at large. There is no basis for this theory. Congress determined that a prompt and fair hearing was in the public interest. A large majority of the shipper participants in Ex Parte 582 wanted BNSF/CN to be judged on the record after a prompt and fair hearing; few, if any, shippers claimed they would be harmed by a fair hearing. And it is hard to imagine any party other than the railroads seeking the Board's protection from competition which would seriously contend that it would somehow suffer cognizable harm if the Board were to abide by the time limitations

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[12] See, e.g., Hyde Park Partners, LP v. Connolly, 839 F.2d 837, 853 (1st Cir. 1988) (substantial and irreparable harm would arise from enforcement of statute imposing one-year moratorium on corporate takeover attempt as sanction for noncompliance with statute's disclosure provisions); San Francisco Real Estate Investors v. Real Estate Inv. Trust, 701 F.2d 1000, 1002-03 (1st Cir. 1983); see also Kennecott Corp. v. Smith, 637 F.2d 181, 188-89 (3d Cir. 1980) (delay in control transaction "in and of itself constitutes irreparable injury"); cf. Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 164 (3d Cir. 1999) (loss of opportunity to pursue merger is irreparable injury).

imposed by Congress in considering control transactions while concurrently conducting a rulemaking relating to control transactions.

As discussed above, BNSF and CN would not be harmed by parallel proceedings that complied with the Congressional deadlines, and neither would the other Class I railroads. The Board asserts that other Class I railroads will focus on fashioning "strategic responses" to the BNSF/CN control application and not on addressing the service problems that continue to prejudice their customers. Decision at 3-4, 5, 7, 8. This supposed "distraction" harm is not plausible. It rests on contradictory and otherwise implausible assertions by other railroads eager to receive the protection the moratorium affords them from the increased competition they correctly anticipate from a BNSF/CN combination. In any case, as described above, the Board has other means to prevent injurious or ill-considered follow-on mergers. Those means are sufficient to meet the Board's findings concerning this supposed distraction and shift in management priorities, which related primarily to another "round" of applications, or to applications seeking to create one or more U.S. transcontinental railroads. See Decision at 3-4, 5, 7, 8, 9. Otherwise, since these railroads have never before shown a reluctance to participate in a competitor's transaction proceeding, and no showing was made in Ex Parte 582 that their prior participation had been "distracting," there should be no need for the Board to be concerned that these railroads will be distracted by participation relating to the BNSF/CN application alone. That would certainly be the case if the Board were to take the simple steps that would assure that, until the other railroads have their service and finances back in order, their "responsive" applications are not practical options.

C. A Stay Is In The Public Interest

A stay would serve the public interest. There is a Congressionally emphasized public interest in the acceptance and prompt consideration of control applications. The public interest would be disserved by broadly forbidding the railroads from engaging in activities, separately or jointly, that could improve service and increase efficiency through control transactions.

CONCLUSION

The Board should stay its Decision pending judicial review and, upon filing by BNSF and CN of their application, reach a decision on the merits within the 16-month period prescribed by statute.

Respectfully submitted,

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Attorneys for Canadian National Railway Company

March 22, 2000

CERTIFICATE

I hereby certify that on this 22nd day of March 2000, I caused a copy of the foregoing Petition of Canadian National Railway Company for Stay Pending Judicial Review to be hand-delivered to the following:

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